

Volume 11

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	NO. CR 14-102-CRB
)	
IAN FURMINGER and EDMOND ROBLES,)	
)	San Francisco, California
Defendants.)	Wednesday
)	December 3, 2014
)	4:10 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: MELINDA HAAG
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102
BY: JOHN HENRY HEMANN
RODNEY C. VILLAZOR
Assistant United States Attorneys

For Defendant Ian Furminger:
LAW OFFICES OF BRIAN H. GETZ
201 California Street
Suite 450
San Francisco, California 94111
BY: BRIAN H. GETZ, ESQ.

Reported by: BELLE BALL, CSR 8785, CRR, RDR
Official Reporter, U.S. District Court
(Appearances continued, next page)

APPEARANCES, CONTINUED:

For Defendant Edmond Robles:

**LAW OFFICES OF TERESA CAFFESE
1000 Brannan Street
Suite 400
San Francisco, California 94103**

**BY: TERESA CAFFESE, ESQ.
HEATHER KELLY, ESQ.**

Also Present:

**Defendant Ian Furminger
Defendant Edmond Robles
Special Agent Melissa Patrick
Special Agent Sandra Flores
Dalida Vartanian
Alycee Lane**

PROCEEDINGS

1 **WEDNESDAY, DECEMBER 3, 2014,** **4:10 P.M.**

2 **P R O C E E D I N G S**

3 (The following proceedings were held outside of the
4 presence of the Jury)

5 **THE COURT:** Okay.

6 **THE CLERK:** You may be seated.

7 **THE COURT:** Let the -- no sound, no sound.

8 **THE CLERK:** Oh.

9 (Sound system switched on)

10 **THE COURT:** Let the Record reflect jurors are not
11 present. But the parties are present, with counsel.

12 We received an instruction -- I mean, pardon me, a note
13 from the jury, which says:

14 "Regarding honest services, can the definition be
15 expounded upon?

16 "Is knowingly buying stolen goods while a city
17 official a denial of honest services?"

18 Those are the questions. So, do we have any preliminary
19 thoughts?

20 **MR. HEMANN:** So, we have a -- we have a suggestion,
21 Your Honor --

22 **THE COURT:** Okay.

23 **MR. HEMANN:** -- that I think we -- we think is
24 getting at the jurors' question.

25 And the suggestion would be in terms of expounding: "If

1 Sergio Sanchez was providing stolen goods to a Defendant for
2 free or at a discount, in exchange for or as a reward for
3 official action or inaction, that could be a scheme under the
4 honest services wire fraud statutes."

5 And I think that the Court would need to say simply buying
6 stolen goods while a city official is not a denial of honest
7 services.

8 So I think -- our intention was to try to actually answer
9 their request for guidance in the first instance.

10 What we would be opposed to is an answer to the second
11 question without an answer to the first question. Because
12 that would just leave them -- and the instruction that the
13 Court gave does answer both of these questions, I think in our
14 view, very clearly.

15 I mean, the instruction is as clear as it gets and it does
16 answer the second in the negative, although they have not,
17 obviously, worked through that and reached that conclusion on
18 their own.

19 **THE COURT:** Mr. Getz? How do you propose we respond
20 to this?

21 **MR. GETZ:** I do agree with the government that -- to
22 the extent I thought I heard the answer "No" to the second
23 question, "Is knowingly buying stolen goods while a city
24 official a denial of honest services?" I thought I heard a
25 "No," but I -- that might have been hearing what I wanted to

1 hear. But that's what I thought I heard.

2 I would rather answer the first question because I heard
3 something that really clanged on my ear. The focus of the
4 government's response was on the state of mind of Sergio
5 Sanchez.

6 **THE COURT:** Right.

7 **MR. GETZ:** And that clashes with the Court's
8 instruction which focused on the state of mind of
9 Mr. Furminger. So, whatever --

10 **MR. HEMANN:** Fair enough.

11 **MR. GETZ:** -- Sergio Sanchez thought or expected is
12 not germane to the question of what Mr. Furminger intended by
13 his actions, which is what the guilty/not guilty vote should
14 be based on.

15 **THE COURT:** I agree.

16 **MR. HEMANN:** That's a fair point. I agree with that.

17 **THE COURT:** All right, fine. Let's start all over
18 again, because we should start all over again.

19 Starting with the second question, I think the answer is
20 not quite yes or no. Because I think the correct answer would
21 be: Knowingly buying stolen goods while a city official can
22 be a denial of honest services, provided that all other
23 elements of the -- of the -- of honest services -- requirement
24 of honest services has been met.

25 I'm not quite sure that's the right thing to say. Because

1 you can have a scheme, you can have a scheme of buying stolen
2 goods -- I'm going to buy stolen goods, and I'm not going to
3 arrest the guy for selling stolen goods. Okay. Let's say
4 that's it. Nothing more. You know: You sell me stolen goods
5 and I won't arrest you. Simple. Simple.

6 Is that -- is that a denial of honest services? Of course
7 it is. Would be, I would think -- that's the scheme. The
8 scheme is to purchase property from a fence, and not arresting
9 him -- or obtaining property from a fence and not arresting
10 him, that is the classic honest services crime. It is a
11 classic -- not "the," but it is a classic honest services
12 crime. But, it has to be part of a scheme.

13 Two, there has would be a *quid pro quo* which is: I'm not
14 going to arrest you or report you for doing the illegal act.

15 For example, a police officer can go out and buy heroin.
16 He has a drug habit. Goes out and buys heroin. He can do
17 that. That's not a honest-services denial. He can speed. He
18 can murder; he can do any of these things. He can do whatever
19 what any other citizen can do. That is not a honest services.

20 The honest services is the *quid pro quo*. In exchange for
21 doing something that is illegal, I'm going to -- I'm going to
22 not arrest you or not prosecute you or not bring you to the
23 attention of other authorities. That's the honest services.

24 What a police officer has to do is -- is -- for this to be
25 a violation, I would think, is not -- is in exchange for the

1 illegal act --

2 **MR. HEMANN:** Right.

3 **THE COURT:** -- not doing something which he is
4 required by law to do. I buy stolen property. Is that a
5 denial of legal -- honest services? No. A police officer
6 buys stolen property, and the answer is: It can be, if there
7 is a *quid pro quo*.

8 **MR. HEMANN:** So that is why, I think, Mr. Getz is
9 correct that the subject of the instruction proposed by the
10 government was -- was misplaced. The subject should be the
11 Defendant.

12 And so, perhaps the instruction should be: If a Defendant
13 obtains stolen goods for free or at a discount in exchange,
14 the *quid pro quo*, for as or as reward for be an official
15 action or inaction, that could be a scheme, in quotes, under
16 the honest services wire fraud statutes. Because --

17 **THE COURT:** I think you have to say --

18 **MR. HEMANN:** Provided the other elements are met.

19 **THE COURT:** I don't know that I would just say
20 "scheme." Could be -- could be considered, could be
21 considered as -- could be an element, could be considered as
22 part of a violation of the honest services act -- well, you
23 have to say "provided that all other elements of the offense
24 are shown."

25 You have to put that in somewhere.

1 **MR. HEMANN:** Sure.

2 **THE COURT:** Because standing alone, I mean, we're
3 subsuming a couple of things. Whether he's a duly -- constant
4 police officer; number two, it happened in be San Francisco;
5 number three, da, da, da, da, da.

6 All those elements have to be met. They have to find
7 there was a fiduciary duty; they have to find a lot of things.

8 **MR. HEMANN:** Their question, though, goes to the
9 scheme elements. And as the Court defined --

10 **THE COURT:** Well, used the term "honest services," so
11 you have to be careful. Maybe you add another sentence.

12 Maybe you say, "Nevertheless, for the Defendant to be
13 convicted of this crime, it is essential that you find every
14 element of the offense, proven beyond a reasonable doubt. All
15 elements of the offense..."

16 **MR. HEMANN:** Or as the Court said, provided that all
17 elements to the offense are proved beyond a reasonable doubt.

18 **THE COURT:** Yeah. Okay.

19 **MR. GETZ:** I have two thoughts.

20 **THE COURT:** Yes.

21 **MR. GETZ:** I think --

22 **THE COURT:** The last two were pretty good.

23 **MR. GETZ:** Even a blind sow finds an acorn now and
24 then.

25 The question is fairly narrow, is it not?

1 **THE COURT:** Well, the first part is.

2 **MR. GETZ:** No, I'm talking about "Is knowingly buying
3 stolen goods while a city official a denial of..."

4 **THE COURT:** No, I think the answer is: It can be.

5 **MR. HEMANN:** I think that is a lawyer's answer, but
6 to answer the question directly you have to say "No" or "Not
7 necessarily."

8 **THE COURT:** No.

9 **MR. HEMANN:** Because you can't read the second
10 sentence without -- the second question without the context of
11 the first question.

12 **THE COURT:** Yeah. But I would be concerned -- I
13 would be concerned that -- let's say we just said no. Let's
14 -- "No" goes back to them.

15 So they say "Oh, well, you know, that part of the proof
16 that he bought stolen goods and he decided not to prosecute,
17 not to arrest Sergio, then we can't even consider that. The
18 Judge said no."

19 So you can't do it that way.

20 **MR. GETZ:** But that brings me to my second point,
21 which is -- addresses what the Court just said.

22 I would ask the Court to think of how I structured this
23 cross-examination. The whole theme of the cross-examination
24 on Sergio Sanchez was that he was performing all these good
25 deeds for the police, and getting to move this computer in,

1 getting a stolen computer, turning the statue in, and all
2 these things that he did. And the reason that was the
3 structure of the cross was we were trying to establish -- and
4 we argued this in close -- that Sergio Sanchez was performing
5 for the San Francisco Police as an informant, and returning
6 things that benefited the public.

7 So, here's why I say that now, because where Furminger
8 buys something from him, if the intent and the goal of
9 Furminger is to foment, cultivate and continue this
10 relationship with a proven informant who is continuing to
11 recover stolen property, then the answer has to be no here.

12 **THE COURT:** I don't disagree with that. I don't
13 disagree with that. But I don't know that that -- that is not
14 what they are saying here.

15 **MR. HEMANN:** We would ask the Court to consider the
16 way Mr. Villazor structured his direct examination.

17 **THE COURT:** I'm not structuring the answer
18 necessarily to meet what I would say is, in a sense, a
19 hypothetical inference of what the evidence shows. I mean,
20 what the evidence shows.

21 I think it is narrower than that. I just --

22 **MR. HEMANN:** We agree. The first question is broad.
23 And the second question comes in the context of that broad
24 request in the first question. I think that the -- the
25 instruction --

1 **THE COURT:** No, that's correct. So what is your
2 proposed --

3 **MR. HEMANN:** Well, I can hand it up.

4 **MS. CAFFESE:** May I weigh in, just --

5 **THE COURT:** Yeah, it might be helpful to get --

6 **MS. CAFFESE:** Yes, go ahead.

7 **THE COURT:** -- the prosecution's -- Okay.

8 (Document handed up to the Court)

9 **THE COURT:** Okay. "If a Defendant obtains stolen
10 goods for free and at a discount..."

11 **MR. VILLAZOR:** "Or at a discount," sorry.

12 **THE COURT:** Pardon?

13 **MR. HEMANN:** "For free or at a discount."

14 **THE COURT:** "...or at a discount in exchange for or
15 as a reward for official action..."

16 **MR. HEMANN:** Or --

17 **THE COURT:** "...or inaction, that could be a scheme
18 under the honest services wire fraud statute, provided that
19 all elements of the offense are proved beyond a reasonable
20 doubt."

21 Let me look at this a minute.

22 "If a Defendant obtains stolen goods for free, or at a
23 discount..."

24 I'm a little troubled by the word "discount" --

25 **MR. VILLAZOR:** Well --

1 **THE COURT:** -- because they would say: Well, what
2 about a legitimate discount? What if he sells a computer
3 that's been used, 40 percent off? You know. And by the way,
4 if you went in to Apple, or blah, blah, blah, it would also be
5 40 percent off.

6 I don't think you can use that word. In other words, I
7 think you have to say something like "below market" or "below
8 its fair value."

9 By the way, I don't know that there is any evidence of
10 what its fair value is. So that's another problem that we're
11 getting into here. Do you see the problems?

12 I'm just taking the "discount." But let's move beyond
13 that. Let's say "for free."

14 **MR. HEMANN:** Right.

15 **THE COURT:** Or "at a below-market cost" or something
16 like that.

17 **MR. GETZ:** Yeah.

18 **THE COURT:** In exchange for official -- well, I think
19 you say "for or as a reward," I don't know --

20 **MR. HEMANN:** Well, "for" is a bribe, and "reward" is
21 a kickback, following the definition.

22 **THE COURT:** Okay, "for or as a reward..." The reward
23 is a gratuity, is that it?

24 **MR. HEMANN:** Well, reward is --

25 **THE COURT:** Okay, "for or as reward for official

1 action or inaction, that could be a scheme under the honest
2 services wire fraud statutes..."

3 Well, it could be -- it's a scheme. That's not the
4 problem. The problem is everything else that goes with it.

5 But maybe, maybe -- maybe you say it could be a scheme
6 under the wire -- under the honest services wire fraud
7 statutes.

8 **MR. HEMANN:** The scheme is the exchange part of the
9 crime.

10 **THE COURT:** Yeah.

11 **MR. HEMANN:** The *quid pro quo* is in the scheme
12 element.

13 **THE COURT:** And I think you have to say, "And the
14 Defendant could be found guilty of honest services wire fraud
15 provided that all the elements of the offense..." I mean, I
16 think you have to say something more. I'm just thinking about
17 it.

18 Maybe it's -- it's not -- it's -- it's not that the scheme
19 meets all the elements of the offense, is it? It's the honest
20 services wire fraud that needs --

21 **MR. VILLAZOR:** The grammar could use a little bit of
22 work, I agree, Your Honor. But we could put a period after --

23 **THE COURT:** Could be a scheme under the honest --
24 period.

25 **MR. HEMANN:** In order to find the Defendant guilty --

1 **THE COURT:** In order to find the Defendant guilty, it
2 is -- you are -- you must find that all elements of the
3 offense -- well, I could say "all elements of the offense as
4 defined in Instruction Number blah, blah, blah." But I would
5 rather not. "All elements of the offense proved beyond a
6 reasonable doubt."

7 So, that would read: "If a Defendant obtains stolen goods
8 for free or at a discount below its fair market value..."

9 **MR. HEMANN:** I don't -- I don't know if "fair market
10 value" --

11 **THE COURT:** Well, do you want to say "substantially
12 free" or --

13 **MR. HEMANN:** So, what the evidence was --

14 **THE COURT:** Yeah, that he paid way less than what --

15 **MR. HEMANN:** Less the street value because, for
16 example, for the Toshiba computer that Mr. Robles obtained,
17 Mr. Sanchez said "The value is \$600, you're getting it for
18 \$200."

19 There is an email with regard to something that
20 Mr. Furminger got, and I don't remember which item, and it
21 says "For you very chea."

22 And I don't know how to articulate that. I'm struggling
23 with how to articulate that in a way that is not directly tied
24 a piece of evidence. But, "discount" is, I guess, as close as
25 I got to that point. You can say "for a price that other

1 people didn't get," but that becomes very cumbersome.

2 **THE COURT:** Well, but that's really saying below fair
3 market value.

4 **MR. HEMANN:** It is. I mean --

5 **THE COURT:** The word -- you can't use "discount"
6 anymore because it's all sold at a discount.

7 **MR. HEMANN:** Maybe "street market value"?

8 **THE COURT:** Discounts on supplies, discounts --

9 **MR. VILLAZOR:** How about "street market value"?

10 **THE COURT:** Well, I don't know what the street market
11 value is. Below street market value? You didn't have any
12 evidence of what the street market value was in the case.
13 Failure of proof.

14 **MR. HEMANN:** Well, but the proof was "For you, chea."

15 **MS. CAFFESE:** May I, Your Honor?

16 **THE COURT:** Well, that's -- yeah.

17 **MR. HEMANN:** You could say "cheap," "for free or
18 cheap."

19 **THE COURT:** Okay, but "for you, cheap," it's a
20 reasonable inference that a person hears the words "for you
21 cheap," believes that that will be beneath fair market value.

22 **MR. HEMANN:** We don't object to the term "free market
23 value."

24 **THE COURT:** "Fair market value."

25 **MR. HEMANN:** I'm sorry.

1 **MS. CAFFESE:** Actually, I would object and I may, if
2 I have any --

3 **THE COURT:** I promise you, I've got until 6:00. And
4 they've left. So, I want to get this thing straight now.

5 "Or below..." well, rather than saying "below fair market
6 value," I could say "below its value."

7 **MR. HEMANN:** Yes, that's better.

8 **THE COURT:** "Fair market value" --

9 **MR. HEMANN:** Yes.

10 **THE COURT:** I think that's a better way, or "below
11 its value."

12 Okay. So, Ms. Caffese.

13 **MS. CAFFESE:** Thank you.

14 **THE COURT:** I just want to read it to you and then
15 you can comment on it; okay?

16 **MS. CAFFESE:** Yes.

17 **THE COURT:** "If a Defendant obtains stolen goods for
18 free or below its value, in exchange for or as a reward for
19 official action or inaction, that could be a scheme under the
20 honest services wire fraud statutes. In order to find the
21 Defendant guilty, however..." I'll put a "however" there
22 because that's always helpful.

23 "...however, you must find that all elements of the
24 offense have been proved..." Proven? Proved. Proved?
25 Proven. "...have been proven beyond a reasonable doubt."

1 Okay, Ms. Caffese.

2 **MS. CAFFESE:** Thank you, Your Honor. I do have a
3 problem with the language of "discount." And that is for this
4 reason.

5 **THE COURT:** I took it out.

6 **MS. CAFFESE:** Well, "below market value," language
7 that --

8 **THE COURT:** No, wait. "Below its value."

9 **MS. CAFFESE:** But you can purchase items through
10 Craigslist below its value. You can purchase --

11 **THE COURT:** No, you can't. No, you can't.

12 **MS. CAFFESE:** Well --

13 **THE COURT:** Because that is the market.

14 **MS. CAFFESE:** I think that is somewhat misleading.

15 So my proposal is that the Court simply say that "It does
16 not, in and of itself, or by itself constitute a denial of
17 honest services. All of the elements of the charge must be
18 proven beyond a reasonable doubt."

19 And this avoids highlighting --

20 **THE COURT:** Okay, let's look at it. So you would
21 say, you would say knowingly buying stolen property while a
22 city official in and of itself... this may be a good way --
23 ...in and of itself is not sufficient of -- is not sufficient
24 to establish -- or prove or whatever -- to establish an
25 honest-services fraud. However, it is one factor, it can be

1 -- it can be one factor -- it can be one -- it can be
2 considered by you in connection -- or along with all the
3 elements -- I don't know --

4 **MR. GETZ:** All the surrounding circumstances.

5 **MR. HEMANN:** So, one possible way to do it,
6 Your Honor, is to give this -- the first part that Ms. Caffese
7 suggested, put a period at the end --

8 **THE COURT:** I haven't finished writing out her
9 suggestion.

10 **MR. HEMANN:** I think you were adding things that she
11 didn't suggest. But --

12 **THE COURT:** Okay, "Knowingly buying stolen property
13 while a city official in and of itself is not sufficient to
14 establish an honest-services fraud," period.

15 **MR. HEMANN:** Period. "However," and then give the
16 instruction the government proposed on the other side the
17 paper there.

18 **THE COURT:** "However, if a Defendant obtains stolen
19 goods for free or below value in exchange for or as a result
20 of an official action or inaction, that could be a scheme
21 under the honest services wire fraud. In order to find the
22 Defendant guilty you must find that all elements of the
23 offense have been proven beyond a reasonable doubt."

24 **MR. GETZ:** The problem with that is it highlights an
25 argument they made in closing argument that is favorable to

1 them, and it ignores the arguments we made. That selects an
2 argument that supports their position in the portion after
3 "However." And it's got to be more even-handed than that.

4 **MR. HEMANN:** It doesn't --

5 **MR. GETZ:** It has to be along the lines of --

6 **THE COURT:** Well, it has to be -- you have to respond
7 to the question. They're responding to the question.

8 **MR. GETZ:** The Court did respond to the question, in
9 the first part of the answer. That is -- that's the best --
10 that is the closest thing to a no. Because, it doesn't say
11 "It could be, if..." which is responding with a yes.

12 We think that the answer should track the narrowest
13 narrowness of the question, which would compel a no. Okay,
14 the Court said the Court didn't like the no because that may
15 mislead them. Fine. Don't give them a no. But then give
16 them --

17 **THE COURT:** Well, okay. Maybe it should say this.
18 You have a point. Let me see if I'm addressing it.

19 Answer: "Knowingly buying stolen property while a city
20 official, in and of itself, is not sufficient to establish an
21 honest-services fraud."

22 **MR. GETZ:** So far, so good.

23 **THE COURT:** Great. "In order to establish an
24 honest-services fraud, each and every element of the offense
25 as set forth in..." -- and I could even say "instructions on

1 Page 6" or whatever it is "...must be established beyond a
2 reasonable doubt."

3 **MR. GETZ:** We like that.

4 **MS. CAFFESE:** Yes. I would agree with that.

5 **MR. HEMANN:** We totally object to that, because
6 you're then -- then you're -- you're doing exactly the
7 opposite of what -- what you're now doing is highlighting the
8 defense argument by answering only the second question that
9 the jury -- the jury -- if their -- if what they were stuck on
10 is this Question No. 2, they would have written either only
11 this question, or they would have written it first.

12 **THE COURT:** Okay, so, what if -- let's take the first
13 part. Let's say the first, I get the first question. Let's
14 say -- they didn't have Question No. 2. Just Question No. 1.

15 Do you know what I would write back?

16 **MR. HEMANN:** "It's in the instructions."

17 **THE COURT:** Yeah. I would write back, "No. It's in
18 the instructions."

19 **MR. HEMANN:** Correct. But Question No. 2 can't be
20 read in the absence here of Question No. 1.

21 With all due respect to the Supreme Court and Congress and
22 everyone who weighs in on the services fraud without the
23 inconvenience of a jury, it's complicated. And --

24 **THE COURT:** But what's wrong with what they
25 suggested?

1 **MR. HEMANN:** Because you are then highlighting their
2 argument.

3 **THE COURT:** What is their argument?

4 **MS. CAFFESE:** No, because, Judge --

5 **THE COURT:** No. I'm not saying any -- about any
6 argument here. All I'm saying is the answer to the first
7 question -- the first question says: Can you expound upon it?

8 To which I would say, in the normal course: Please review
9 Instruction 6a. Okay, whatever number it is. Special
10 Instruction -- no, that's -- I would say, "Page 7, Counts 3 or
11 4, honest services, wire fraud."

12 So I would say, "Please refer to Page 7" -- "Page 7 and
13 8," or maybe "7" -- no. "Please refer to..."

14 **MR. HEMANN:** Pages 8 and 9.

15 **THE COURT:** "...Page 7, 8 and 9 with respect to
16 honest services wire fraud."

17 Okay. Then I would go on to say: As to your specific
18 question, the answer is no. The answer is no, in and of
19 itself. However -- however -- it can be considered -- it can
20 be considered, with respect to all of the elements --

21 **MR. GETZ:** What the Court wrote is exactly what we
22 would like.

23 **MS. CAFFESE:** Yes.

24 **MR. GETZ:** -- because that --

25 **THE COURT:** I forgot what I said. "Knowingly buying

1 stolen property...in and of itself...However, it can be
2 considered by you along with all the elements of the offense,
3 which are set forth on Page 7, 8 and 9 of your instructions.

4 Okay, let's see how that works. I don't know why you are
5 so apoplectic about it this.

6 **MR. HEMANN:** Well, I'll tell you in a moment.

7 **THE COURT:** Okay. Knowingly buying stolen property
8 while a city official in and, in and of itself is not
9 sufficient -- "in and of itself" is the key word here. In and
10 of itself is not sufficient to establish an honest services
11 crime. However it can be considered by you along with all of
12 the elements of the offense which are set forth on Pages 7, 8
13 and 9 of your instructions. All of the elements of the
14 offense which must be proven.

15 In other words I'm telling them, you can consider this,
16 you can consider -- you can consider it but you have to
17 consider it in the context of everything else. It's like that
18 old thing about what people say about, you know, facts and
19 circumstances surrounding the conduct, while you may strike a
20 particular, you know, incriminatory statement, you may
21 consider all the facts and circumstances surrounding why that
22 statement was made or something like that.

23 **MR. HEMANN:** How about --

24 **THE COURT:** Yeah, go ahead.

25 **MR. HEMANN:** "However, if it was in exchange for

1 official action or inaction, then you may consider it."

2 **THE COURT:** No, and I'll tell you, because that is
3 making their argument. I mean, that is making your argument.
4 And, and, and I don't think I should single it out.

5 I think it's appropriate at this point to tell them they
6 can consider it. They can consider it, along with all
7 evidence relating to the elements of the offense as set forth
8 or relating to -- the elements as set forth on Pages 7, 8 and
9 of the instruction.

10 So it would read "However, it can be considered by you
11 allege with all the evidence..."

12 **MR. HEMANN:** If the Court were to flip the clauses it
13 would be okay. Because --

14 **THE COURT:** Okay. Have you given it to me the way
15 you think it would be all right?

16 **MR. HEMANN:** The way we thought at the beginning was
17 the way we thought but in this context it would be "You may
18 consider amongst all of the..."

19 **THE COURT:** Wait, "You may consider..."

20 **MR. HEMANN:** "...circumstances" or "all of the
21 elements..."

22 **THE COURT:** You may consider what?

23 **MR. HEMANN:** "...that the Defendants knowingly bought
24 stolen..." I'm not -- I don't have it in front of me. But,
25 but if -- if the Court's instruction is that they may consider

1 it, then that's the first thing that the Court should say.

2 However, --

3 **THE COURT:** Okay, okay.

4 **MR. HEMANN:** -- alone, it's not enough.

5 **THE COURT:** That may be all right.

6 "You may consider..."

7 **MR. HEMANN:** "Whether" -- "but alone, that is not
8 enough." I think that tracks the -- the way the jurors are
9 asking it.

10 **THE COURT:** "You may consider" -- okay. "You may
11 consider..." What if I say this? Okay, I'm going to give you
12 another one.

13 You can tell the jury they have to meet on Saturday.

14 Okay. See, see if this works: "The fact that a Defendant
15 bought stolen goods while a city official, in and of itself,
16 is not sufficient to establish a wire services fraud.
17 However, that evidence may be considered by you in determining
18 whether each and every element of the wire services fraud as
19 set forth on Pages 7 through 9 of these instructions has been
20 proven beyond a reasonable doubt."

21 **MR. GETZ:** That's a green light for Mr. Furminger.
22 We say give it to them.

23 (Reporter interruption)

24 **THE COURT:** Oh, honest-services fraud. That's right.
25 Good. I meant honest-services fraud, I meant honest services.

1 Okay. I mean, I think that's absolutely neutral.

2 I'm trying -- I'm trying to be neutral in this thing, not
3 give anybody's argument. And I think you raise a good point.
4 And, that's the way it's going to be unless you can convince
5 me that I'm wrong.

6 Oh, Ms. Caffese go right ahead.

7 **MS. CAFFESE:** I'm pretty much satisfied. But my
8 concern, though, Judge, is the fact that there's the
9 suggestion or that there's the finding that the property was
10 knowingly stolen. I mean, that really is a question for the
11 jury.

12 And the way that the government --

13 **THE COURT:** (Inaudible) They say it's knowingly
14 buying stolen goods. I don't know.

15 **MS. CAFFESE:** I'm concerned a little bit with the
16 speculation that we're engaged in here, in trying to identify
17 what the jury is thinking. And that's why I think the more
18 general response is the more appropriate one.

19 **THE COURT:** Which is?

20 **MS. CAFFESE:** Which is essentially -- which is the
21 one that I read to you.

22 **THE COURT:** I mean, I have to take their question as
23 they give it to me. They're saying -- if they don't find --

24 **MR. HEMANN:** Implicit in their question is that one
25 or more of the jurors is sitting back there, saying, "I think

1 that the property was knowingly purchased. If we conclude
2 that, is that a violation..."

3 **THE COURT:** Purchase --

4 **MR. HEMANN:** Stolen property was knowingly purchased
5 by the Defendants, or knowingly taken by the Defendants. It's
6 implicit in their question that at least one of them has
7 reached that conclusion, and wonders whether that, alone, is
8 enough.

9 **THE COURT:** Well, I might have to change this. You
10 raise a good point. I think you have to say the fact that a
11 Defendant knowingly bought stolen goods. In other words, it
12 couldn't be inadvertent.

13 **MR. HEMANN:** Correct.

14 **THE COURT:** So I think I have to -- that should help.
15 I -- I guess I could change it, "If you find that a Defendant
16 bought stolen..." "...knowingly bought stolen goods while a
17 city official, that fact, in and of itself..."

18 "That fact"? Or "that finding"? I don't care.

19 "...that fact, that finding, in and of itself is not
20 sufficient to establish honest-services fraud. However, that
21 evidence may be considered by you in determining whether each
22 and every element of honest-services fraud as set forth on
23 Pages 7 through 9 of these instructions has been proven beyond
24 a reasonable doubt."

25 **MR. GETZ:** We think the predecessor answer that the

1 Court proposed is more directly answering the question.

2 **THE COURT:** You mean, I shouldn't say "the fact
3 that"? I should say -- I should simply say "If" -- I mean,
4 shouldn't I say "If you find that a Defendant knowingly bought
5 stolen goods..."?

6 **MR. GETZ:** No, I think the Court's other --

7 **THE COURT:** Well, what was that, what did I say?

8 **MR. GETZ:** The predecessor answer that Mr. Furminger
9 greenlighted was the format we suggest, because it was
10 shorter. I can't recite it, but it's available if the Court
11 would like to hear it.

12 I would call upon Ms. Ball to --

13 **THE COURT:** Can you go back and see what I said just
14 before?

15 (A portion of the Record read back by the Reporter)

16 **THE COURT:** So the only -- is this all right with
17 you?

18 **MR. GETZ:** That's got the Ninth Circuit written all
19 over it.

20 **THE COURT:** Okay, yeah, great. Which part?

21 I'm going to add the word "knowingly" because I think in
22 fairness to the defense, you want that. Do you see another --
23 inadvertently buy stolen goods.

24 I may -- not knowing they were stolen goods, I can't
25 believe that that would be a crime. I have to knowingly buy

1 -- I mean, given their instruction --

2 **MS. CAFFESE:** Their question?

3 **THE COURT:** Their question, rather, I think you want
4 the word "knowingly" in there.

5 **MS. CAFFESE:** On behalf of Mr. Robles --

6 **THE COURT:** He says -- the jury says it is knowingly.
7 So I want to put it back in. You can't complain about that.
8 You can complain about a lot of things, but you can't complain
9 that I take the jury's heightened proof requirement and give
10 it back to them.

11 Anyway, I'm going to do it and you can --

12 **MR. HEMANN:** So here's --

13 **THE COURT:** Your complaint.

14 **MR. HEMANN:** Here's my complaint. So, my complaint
15 is that I believe that the Court is now highlighting Question
16 No. 2, without answering Question No. 1.

17 I think the -- the Court's giving the Defendants' answer
18 to No. 2, and then it's No. 1, saying, "Just go back and read
19 my instructions," because --

20 **THE COURT:** But I would have done that anyway.

21 **MR. HEMANN:** If Question No. 2 hadn't been there.

22 **THE COURT:** Right. So I'm trying to address Question
23 No. 2 in the context -- Question No. 1 in the context of
24 Question No. 2.

25 **MR. HEMANN:** So, perhaps, and this extent -- this is

1 going to sound more complicated than it is. The --

2 **THE COURT:** That's not good.

3 **MR. HEMANN:** So, bear with me. So, the section --

4 **THE COURT:** That's like "Wagner's music is better
5 than it sounds."

6 **MR. HEMANN:** Yes.

7 **THE COURT:** Right.

8 **MR. HEMANN:** This may be exactly that. The -- the
9 portion of the instruction that I believe they are focused on
10 is on Page 8. And it is at the bottom, after the seventh
11 element. And it starts "Bribery and kickbacks involve the
12 exchange of a thing or things..."

13 **THE COURT:** Page 7, isn't it?

14 **MR. HEMANN:** That's my Page 7.

15 (Off-the-Record discussion between counsel)

16 **MR. HEMANN:** Oh, this is the earlier. I think the
17 language is the same.

18 **THE COURT:** All right.

19 **MR. HEMANN:** But it's:

20 "Bribery and kickbacks involve exchange of a thing or
21 things of value for official action..."

22 (Reporter interruption)

23 **MR. HEMANN:** (As read)

24 "Bribery and kickbacks involve the exchange of a
25 thing or things of value for official action by a

1 public official. Undisclosed conflicts of interests
2 or undisclosed self dealing is not sufficient. The
3 Defendant must have intended to trade an official
4 action for items of value."

5 Period. Okay.

6 "Therefore..." and then start what the Court read, the
7 green -- the Furminger green light. And then, finish.
8 Because then I think the Court is expounding upon the
9 question.

10 So you go through, and then say the -- I think that might
11 more directly answer what the jury is asking.

12 **MS. CAFFESE:** And that requires us to speculate,
13 Your Honor.

14 **MR. HEMANN:** You don't think --

15 **THE COURT:** Thank you. That's very helpful.

16 Okay. Here we go: "The fact that a Defendant knowingly
17 bought stolen goods while a city official is not, in and of
18 itself, sufficient to establish honest services wire fraud.
19 However, that evidence may be considered by you in determining
20 whether each and every element of..." I can say "...the crime
21 as set forth in Pages 7, 8, and 9 of your instructions has
22 been proven beyond a reasonable doubt."

23 **MR. HEMANN:** Allow me to take one more crack. It
24 will be my last crack at this.

25 The concern I've got is they're not asking about each and

1 every element. They are asking about the scheme element.
2 Their question is directed at the scheme element. And I'm
3 concerned that the focus is -- you are saying no to their
4 question about the scheme element, and then saying: Go
5 consider all the rest of them.

6 So perhaps it could be, whether each and every element,
7 whether there was --

8 **THE COURT:** Okay, I could say "whether the crime as
9 set forth on Pages 7, 8, 9 of your instructions has been
10 proven beyond a reasonable doubt." I don't have to say "each
11 and every" here, because that is an argument.

12 "Beyond a reasonable doubt" is actually an argument.

13 **MR. GETZ:** But I think the Ninth Circuit has
14 condemned the kind of selection that the government is asking
15 the Court to make as to what the jury meant, beyond the four
16 corners of this question.

17 And the government did that when it said "I think that the
18 jury's talking about Page 7" when there isn't any word
19 "scheme" in that question.

20 We think just the opposite: That the whole thing is about
21 Lines 19 to 24 on the government -- on the Court's final
22 version, Page 8 of the instructions. And that has nothing to
23 do with Page 7. So, I think --

24 (Off-the-Record discussion between counsel)

25 **MR. HEMANN:** I was using the wrong, wrong page.

1 **THE COURT:** I'm sorry; what lines are you talking
2 about?

3 **MR. GETZ:** On the Court's final version, the most
4 recent e-filed, I'm looking at Page 8, Line 15 to 24. And --

5 **THE COURT:** Well, but I tell them to look at it. I
6 tell them, "the crime as set forth on Pages 7, 8 and 9."

7 **MR. GETZ:** That part, I like. But where the
8 government focuses on the word "scheme," and the word "scheme"
9 is --

10 **THE COURT:** I'm not using the word "scheme." I never
11 use the word "scheme."

12 **MR. GETZ:** I'm suggesting -- we're asking the Court
13 to do the one that was immediately before the green light
14 reference.

15 **THE COURT:** That's fine. The only question is --
16 that's fine. That's what I've written here, in my view.

17 And the only question in my mind is whether I have to or
18 should say "each and every element of the crime." Whether I
19 should simply say "by you in determining whether the crime as
20 set forth." Rather than say "each and every element of the
21 crime."

22 **MR. GETZ:** We ask for "each and every element"
23 because that is consistent with the instructions the Ninth
24 Circuit has given us.

25 **THE COURT:** That is true with every crime.

1 **MR. HEMANN:** They're not asking about each and every
2 element.

3 **MS. CAFFESE:** How do we know that? We are engaging
4 in speculation when we're trying to figure out what the jury
5 is asking for. I think the most appropriate response is what
6 the Court was going to give them.

7 **MR. HEMANN:** I agree with Ms. Caffese; we're engaging
8 in speculation. So, I think that because we are engaging in
9 speculation, perhaps the instruction the Court should give
10 tomorrow morning is: "This question is answered by my
11 instructions; go back and read them."

12 **THE COURT:** Oh, no, I'm not going to --

13 **MR. HEMANN:** And then if they're still stuck, they'll
14 ask a better question. Because it is answered by the
15 instruction.

16 It's answered by the instruction that says (As read):

17 "Undisclosed conflicts of interests or undisclosed
18 self dealing is not sufficient. The Defendant must
19 have intended to trade an official action for items
20 of value."

21 **THE COURT:** The problem is -- the question is "Is
22 knowingly buying stolen goods while a city official denial of
23 honest services?"

24 And the answer is: Yes, it could be, if there's --
25 everything else is proven.

1 **MR. HEMANN:** If the Court says that, we agree. Yes,
2 it could be.

3 **THE COURT:** But I said it in the negative. I said
4 it, in and of itself, is not -- is not a crime. But it can be
5 considered by you in your consideration of the crime itself.

6 I could take out "each and every element" because I think
7 that is argument. So in other words, it would read "However,
8 that evidence may be considered by you in determining whether
9 the crime as set forth in Pages 7, 8 and 9 of your instruction
10 has been proved beyond a reasonable doubt."

11 **MR. HEMANN:** If the Court began the instruction with
12 "It could be," period.

13 **THE COURT:** I'm not going to say that.

14 **MR. HEMANN:** I thought the Court just said that was
15 the answer. The answer is it could be.

16 **THE COURT:** It could be, as part. It could not be,
17 standing alone.

18 **MR. HEMANN:** Agreed.

19 **THE COURT:** And that's all I'm saying here. "In and
20 of itself" means standing alone.

21 **MR. HEMANN:** But.

22 **THE COURT:** Then I go on to say -- I go on to say, it
23 may be considered.

24 **MR. HEMANN:** I think that gets -- my firm belief is
25 that that gets completely lost in -- it could be considered

1 along with a whole list of other things, look at Pages 7
2 through 9. If the Court said it could be but not standing
3 alone --

4 **MR. GETZ:** No.

5 **MR. HEMANN:** -- that's clear. And the reason that
6 Mr. Getz doesn't like it is because it's clear, that way. And
7 it's crystal clear that it could be. Which I think has been
8 the Court's reaction to this --

9 **THE COURT:** Okay, so not standing alone. Someone
10 says, "Well, what does that mean?" They say, "Well, what does
11 that mean?"

12 And the answer to that really is, "Well, that means that
13 it's evidence, and it could be considered."

14 I think this is --

15 **MR. HEMANN:** If the Court says it could be evidence,
16 then --

17 **THE COURT:** I'm trying to figure out what's wrong
18 with my instruction, not whether it's brilliant. I'm just
19 trying to figure out: Have I said something that's wrong?
20 Have I said something that's not appropriate in the law?

21 They seem to suggest -- and I don't know which way it
22 goes. They're either asking the question: Is this enough?
23 Knowingly buying stolen property while a cop, is that enough?
24 Or they're saying: You need it.

25 I don't know what they're saying.

1 **MR. HEMANN:** I don't, either, Your Honor. And I
2 think we're -- so the Court's answer that it could be enough,
3 as long as you find all of the other elements, --

4 **THE COURT:** Yeah.

5 **MR. HEMANN:** -- is fine.

6 **THE COURT:** That's what I just said.

7 **MR. HEMANN:** But I think that the way the Court
8 starts it, it sounds to me like the Court is saying "No,
9 unless..."

10 **THE COURT:** I'm saying not, in and of itself -- I'm
11 mean, I'm sorry; I didn't invent this language.

12 **MR. HEMANN:** I know.

13 **THE COURT:** I -- I mean, you've got to use words in
14 the English language, and hope that they communicate the same
15 meaning to people that -- I mean, its simple form that you
16 would intend.

17 What I intend to tell them is in and of itself, standing
18 alone, without anything else, no. It is not a crime, an
19 honest services wire fraud crime, for a police officer to
20 knowingly buy stolen property or knowingly -- I mean, it's not
21 wire -- I mean, not honest-services fraud; it's something
22 else. It's receiving stolen property. 496. You know. Or
23 buying dope is 11355(a), or whatever it is.

24 I mean, yeah, there's crime, but not this crime. They're
25 talking about this crime.

PROCEEDINGS

1 **MR. GETZ:** We're in the amen corner on that.

2 **THE COURT:** Amen. Amen. Okay, that's what I'm going
3 to write. I'm going to write -- I've taken out "each and
4 every element" because it's argumentative.

5 I'm leaving in the unreasonable (Inaudible) -- Mr. Getz
6 has given you a green light, so I don't -- if I took it out it
7 would become an amber light. And, it's also ten after 5:00.
8 So, those are all the reasons -- the considered reasons I'm
9 going to give it the way I'm giving it.

10 I'll write it and send it to the jury, and they'll have it
11 first thing in the morning, fresh.

12 **MR. GETZ:** Submitted.

13 **MS. CAFFESE:** Thank you, Your Honor.

14 **THE COURT:** You don't have to say "Submitted." I've
15 got it --

16 **MR. HEMANN:** No, I --

17 **THE COURT:** You don't have to say --

18 **MR. HEMANN:** It's all good, it's all good. Thank
19 you, Your Honor.

20 **THE COURT:** It's all good. Thank you. Everybody go
21 home.

22 (Conclusion of proceedings)

23

24

25

CERTIFICATE OF REPORTERS

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



/s/ Belle Ball

Thursday, December 4, 2014

Belle Ball, CSR 8785, CRR, RDR